JUDICAL RECALL

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It may be fairly said that the judicial system of the United States, both Federal and State, is now on trial before the bar of public opinion of the country. Its sufficiency in the administration of justice both civil and criminal has been publicly arraigned, not only in the public press and in the State and American Bar Associations, but by our foremost citizen, himself an experienced jurist, the President of the United States. This public challenge of our judicial system in the practical administration of justice has made a profound impression upon public as well as professional opinion, and deserves the most thoughtful attention not only of the bar, but of the general public.

The delay in the administration of justice, which is often a denial of justice, is said to characterize our judicial system in notable contrast with that of Great Britain and Canada and of the Continental countries.

It is an interesting fact that this deplorable inadequacy of our judicial system has been developed, at least in the State courts, since what may be called the thorough democratization of the courts. In nearly all the States the judges have been made elective instead of appointive. The terms are comparatively short. In nearly all the States judges are nominated by party conventions and elected at the general public elections.

Mr. James Bryce, in the recent revision of his profound commentary upon our institutions, says that "the American State Bench "has suffered from the too prevalent system of popular election and "from the scanty remuneration allotted."

The distrust of judicial power has extended beyond the shortening of judicial terms. Although the ancient forms of pleading have been generally abolished, the Codes of most of the States undertake to provide the details of judicial procedure, and in many of the States the trial judges are compelled to give their instructions to the jury in writing and are forbidden to comment upon the testimony. In some of the States the appellate judges are forbidden to exercise any discretion as to what opinions should be given in writing, and are compelled to set out in their opinions a full statement of the facts and the reasons for their

conclusions. The result has been a congestion in the appellate courts of many States, which has brought about a practical denial of justice.

Thus we have had in effect for many years in the States a system of effective judicial recall in the short judicial terms. It is not my purpose to discuss the merits and demerits of the elective and appointive systems. It is true, however, that the selection of judges in a country of rigid written constitutions, where the courage and independence of the judiciary are essential to provide a public security, requires the supreme exercise of intelligence and self restraint on the part of the people. The judges selected by popular vote for the State courts have often ranked high in ability and character, and in many cases have compared well with those selected by the appointive system in the Federal courts; and these facts doubtless bear eloquent testimony of the high and discriminating intelligence of the American people. Mr. Bryce says, in reference to this subject, comparing our judicial system with that of England, that we must aim "to procure men of character, learning and intellectual power, and to secure in them that public confidence which is now sometimes absent; ample remuneration must be paid, a life tenure secured, and the appointments placed in responsible hands."

The principle of recall, when applied to a long term executive or administrative official, may have some justification. It is doubtless true that the high intelligence of the American electrate would probably prevent an abuse of the right of judicial recall, if it was established. But that does not answer the objection. The danger lies in its effect upon the independence of the individual judge, who would render every opinion where public opinion or class interest was involved on one side or the other, under the threat of having his judicial position publicly challenged, and submitted for decision by the people at the polls.

Not only then would this extension of this right of recall—I say extension because it already exists wherever short judicial terms prevail—directly further impair the independence of the judiciary, but it would tend to aggravate the imperfections and resulting delays in the administration of justice. The reason is obvious. It is the independence and the tremendous prestige of the judges in England which have been so potent a factor in securing a speedy and effective administration of justice in the English courts. In this country, through our short terms, meager

salaries, the prohibition of any discretionary power of the Court, we have directly depreciated the judicial position and made the trial judge but an umpire between contending counsel. We cannot remedy the existing situation until we enlarge and dignify the position of the judge. We must make our judges more, and not less, independent. A further depreciation of the judicial office can only aggravate our existing defects in the administration of justice. We must elevate the judicial office, elect judges who are worthy to be trusted, enlarge their judicial discretion in framing the rules of procedure, and no step can be taken more fatal to the hopes of remedying the existing discredit of our judicial administration than in the further subjecting our judges to the passing waves of popular whims and prejudices.

The judicial recall is, therefore, to be condemned, not because the people would be unwise in its exercise, but because its existence, whether exercised or not, would be fatal to the independence of our judges.

The proposed recall of judicial decisions, where the constitutionality of statutes is involved, that is, the submission of the decisions to a popular vote, is open to the same objections as that of the recall of the judge. In fact, it is in principle more objectionable. In the recall of the judge, the people would only be asked to vote upon the fitness of the individual judge. This does not involve the exercise by the people of an essentially judicial function. The novel suggestion of recall of judicial decisions doubtless springs from an impatience over the delay in securing reforms, growing out of the decisions of the courts, that such enactments are violative of the State or Federal constitutional guaranties of property rights. Such a remedy misconceives the fundamental theory of our political system with its distribution of the powers of government. Mr. Lowell has wisely said that our constitutions obstruct the whim but not the will of the people. The whole system of constitutional restraints embodied in our rigid Federal and State constitutions, limiting the power of our legislative bodies, does not involve any distrust of the people, or any attempt to impose the will of the minority upon the majority. In the last analysis the purpose of these constitutional checks and balances is to insure the sober second thought of all the people, in whom alone the ultimate sovereignty resides.

As Mr. Hamilton pointed out in the 76th Federalist, "The complete independence of the courts of justice is peculiarly essential

in a limited constitution." The judiciary, he says, is the weakest of the powers of government; and he adds, "It is a mistake to suppose that the independence of the judiciary supposes a superiority of the judiciary to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former."

No one can deny that the complex Federal system of this country, with what Mr. Bryce terms its rigid written constitutions both in the State and Nation, tends to make the operation of public opinion slower, and may sometimes tend to intensify professional conservatism, and to make our lawyers and judges strict constructionists, so that at times they may seem to ignore the substance in searching for technical arguments and objections. The remedy, however, does not lie in destroying or impairing the independence of the judges or in otherwise degrading the judicial office, or in submitting to the hustings grave questions of constitutional construction concerning the legislative power over personal and property rights.

There are remedies, however, which may provide effectually against an undue obstruction of the popular will in effecting needed reforms.

In the first place, the one fertile cause of the class of decisions in question is the excessive legislation in our State constitutions, particularly in those most recently adopted. The dockets of the courts in such States are crowded with constitutional questions which should not exist in any country. The remedy lies, of course in omitting such detailed legislation from our constitutions and in making them readily amendable, that is, while making provisions for due and proper consideration of amendments.

Secondly, it is also true, as the American Bar Association has recommended, that the existing law whereunder a State court may finally construe the Constitution of the United States by upholding a claim of right thereunder, should be amended so that every such case where a State statute is adjudged by a State court to violate the Federal Constitution, would be carried for final decision to the Supreme Court of the United States. It is an anomaly that such State decision on the constitutional guaranty of due process under the Constitution of the United States should

be final. The remedy lies in amending the Act of Congress, and not in providing for a review of the correctness of the Court's construction by the voters of the State. In such a recall of a judicial decision, the question on which the voters would divide would be the desirability of the legislation from their point of view, and the judicial question of constitutional power would be ignored.

Third, there is a further remedy where the desired reform is found in amending the State Constitution where judicial decision shows a conflict of legislation with the Constitution. The same popular vote which can review the decision under the proposed recall can prevent the possibility of such decisions in the future by repealing or amending the provision of the Constitution.

But whatever is done, we should not make impossible the remedying of the existing deplorable defects of our judicial system, which have been the outgrowth of our political conditions, by further degrading the judicial office through impairing judicial independence. On the other hand, while simplifying and expediting the procedure of removing, upon due hearing, the judge who dishonors his office, we should direct all of our efforts to the elevation and dignifying the judicial office, in enlarging the judicial discretion, and thus securing needed reform in the prompt administration of justice, and further insuring the judicial independence which is essential to a self-governing people.

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